

Chapter highlights

- **Purpose:** This chapter contains general policies applicable to the procurement of IT goods and services.
- **Key points:**
 - Under Virginia’s Freedom of Information Act, the presumption is that all documents in the possession of any public body or public official and all meetings of state and local public bodies are open to citizens of the Commonwealth.
 - To the extent allowed by law, this public body does not discriminate against faith-based organizations in accordance with the *Code of Virginia*, [§ 2.2-4343.1](#) or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, sexual orientation, gender identity or expression, political affiliation, or status as a service disabled veteran or any other basis prohibited by state law relating to discrimination in employment.
Placing multiple orders to one or more suppliers for the same, like or related goods or services in order to avoid having to utilize the appropriate method of procurement or to remain within delegated procurement authority or to avoid competition is prohibited.

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10.0 Introduction

These policies are applicable to all procurements of IT goods and services. These policies were developed to clarify and implement the various provisions and requirements of the Virginia Public Procurement Act and the *Code of Virginia* pertaining to IT procurement.

10.1 Freedom of Information Act

Under Virginia law, the presumption is that all documents in the possession of any public body or public official and all meetings of state and local public bodies are open to citizens of the Commonwealth. The Virginia Freedom of Information Act (FOIA) ([§§ 2.2-3700 et seq.](#) of the *Code of Virginia*) guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials and public employees. The purpose of FOIA is to promote an increased awareness of all persons of governmental activities. FOIA requires that the law be interpreted liberally, in favor of access, and that any exemption allowing public records to be withheld be interpreted narrowly. VITA requires all IT procurement professionals to comply with the Commonwealth's Freedom of Information Advisory Council's requirements and their own agency's policies and procedures. VITA SCM procurement professionals must follow the current SCM process and procedures. In addition, before any agency can procure a system, equipment or software, the agency must consider whether it is capable of producing products that facilitate the rights of the public to access public records under FOIA.

10.2 Confidentiality

Confidentiality of all information utilized in the procurement process is very important to ensure fair and open competition for suppliers competing for Commonwealth contracts. All information and documentation relative to the development of a solicitation or contractual document for a proposed procurement is confidential. These records will not be open to public inspection until completion of the procurement process. All information and documentation relative to the development of a specification or requirements document is confidential until the procurement process is completed. Pursuant to [§ 2.2-4342](#) and [§ 2.2-4343](#) of the *Code of Virginia*, trade secrets or proprietary information that a supplier wishes to exempt from FOIA disclosure must be specifically identified by bidder with a statement of the reason(s) the protection is necessary. A supplier shall not improperly designate as trade secrets or proprietary information (i) an entire bid, proposal, or prequalification application; (ii) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (iii) line item prices or total bid, proposal, or prequalification application prices. Refer to [Chapter 5](#), Ethics in Public Procurement, for more information and for a VITA- approved Confidentiality and Conflict of Interest Statement form.

It is critical to ensure that no records or information are disclosed from a supplier's proposal that are marked "Confidential" or "Proprietary," are included in such supplier's redacted proposal or are responses in the supplier's ECOS/Security Assessment, including any security exceptions, if applicable.

10.3 Section 508

10.3.1 Overview

As specified in [§ 2.2-2012\(B\)](#) of the *Code of Virginia*, procurement of all IT must be made in accordance with the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794(d)).

Section 508 refers to a statutory section in the Rehabilitation Act of 1973 (found at 20 U.S.C. § 794d). The primary purpose of Section 508 is to provide access to and use of government electronic and information technology (EIT) by individual with disabilities. Section 508 requires federal agencies to ensure that their procurement of electronic and information technology takes into account the needs of all end users – including people with disabilities. The statutory language of section 508 is available online by accessing <http://www.section508.gov>.

Section 508 enhances the ability of federal employees with disabilities to have access to and use of information and data that is comparable to that provided by others. EIT products include products that store, process, transmit, convert, duplicate, or receive electronic information. Examples of included products are copiers, computers, fax machines, information kiosks, software, operating systems, websites and telecommunications products.

Section 508 requires that when agencies develop, procure, maintain or use information technology - (1) individuals with disabilities who are employees have access to and use of information and data that is comparable to the access to and use of the information and data by employees who are not individuals with disabilities; and (2) individuals with disabilities who are members of the public seeking information or services from an agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities. Comparable access is not required if it would impose an undue burden on an agency. The law is not limited to assistive technologies used by people with disabilities, but applies to the development, procurement, maintenance, or use of all electronic and information technologies.

The United States Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for developing information and communications technology.

Pursuant to this goal, the Access Board issued a final rule that updated accessibility requirements covered by Section 508, and refreshed guidelines for telecommunications equipment subject to Section 255 of the Communications Act. The final rule went into effect on January 18, 2018. The final rule with the revised Section 508 standards can be reviewed at: <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule/single-file-version>.

10.3.2 VITA's authority to promulgate regulations pertaining to Section 508

VITA has statutory authority to promulgate regulations to ensure that all procurements of information technology of every description meet the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended.

In order to maintain maximum flexibility for the Commonwealth and in light of the ever- changing information technology market, VITA has chosen to implement the electronic and information technology accessibility standards of Section 508 through policy. VITA is committed to ensuring that all procurements of information technology purchased by VITA or on behalf of other agencies meet, to the greatest extent possible, the electronic and information technology accessibility standards of Section 508. Refer to VITA's IT accessibility compliance websites for detailed guidance at: [IT Accessibility Standards](#), [Web Site Standards](#), [Web Site Guidelines](#). Also, refer to [ITRM Standard GOV103-00](#).

10.3.3 Section 508 standards

Section 508 standards are technical specifications and performance-based requirements which focus on the functional capabilities covered by technologies. These standards are organized into six sections:

- Software applications and operating systems
- Web-based intranet and internet information and applications
- Telecommunications goods and services
- Video and multimedia goods and services
- Self-contained, closed goods and services
- Desktop and portable computers

Section 508 affects what the Commonwealth acquires (i.e. the requirements development process) but not how the information technology is acquired (source selection). Section 508 applies to both goods and services. Section 508 does not require suppliers to manufacture EIT products that meet the Access Board, standards. However, by requiring the federal government to purchase EIT products that meet the Access Board's standards, Section 508 provides an incentive for EIT manufacturers and designers to ensure that their products are usable by people with disabilities.

10.3.4 Defining requirements under Section 508

When developing requirements for any IT procurement, the agency should be familiar with Section 508 requirements and determine which technical provisions apply to the IT goods or services being procured. In addition, market research should be performed to determine the availability of products and services that meet the applicable technical provisions. The agency should determine if Section 508 products or services are available in the marketplace or if the product or service would be eligible for an exception such as non-availability or undue burden.

10.3.5 IT Procurements not applicable to Section 508

Section 508 does not apply to all IT goods and services which may be procured for the Commonwealth or public bodies. These exemptions may apply:

- *Built-in assistive technology is not required where it is not needed.* Section 508 does not require that every EIT product to be fully accessible for persons with disabilities. Products such as desktop computers do not have to have refreshable Braille displays, but must be compatible with refreshable Braille displays so

that a blind individual can use the agency's standard workstation if needed as a reasonable accommodation.

- *Undue burden.* Agencies do not have to procure EIT products that satisfy the Section 508 standards if doing so would create an undue burden on the agency. "Undue burden" generally means "significant difficulty or expense." If an agency invokes the undue burden exception, Section 508 requires that information and data be provided to individuals with disabilities by an alternative means of access. Agencies should not alter their technical requirements to comply with Section 508 if the alteration would result in the agency procuring IT that did not meet its needs.
- *Non-availability.* This refers to circumstances where no Section 508 commercial items are available to meet the agency's IT procurement needs.

10.3.6 Section 508 exception

All IT goods and services procured by the Commonwealth must comply with the accessibility standards of Section 508. The one exception to IT accessibility is if the agency includes a written explanation in the procurement file signed by the agency head which explains why, and to what extent, the standards impose an undue burden or exception. All contracts for IT goods and/or services should contain the term and condition which requires that any goods or services provided by the contractor under the contract are Section 508-compliant.

10.3.7 Suggested solicitation language to ensure Section 508 compliance

The following statement is recommended to be included in all RFPs: "All electronic and information technology (EIT) procured through this Request for Proposal (or Invitation for Bid) must meet the applicable accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, and is viewable at the following URL: <http://www.section508.gov>."

10.3.8 Suggested contractual language to ensure Section 508 compliance

Contracts signed with information technology suppliers should contain the provision set forth below or substantially similar language: "Supplier hereby warrants that the products or services to be provided under this agreement comply with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794d), and its implementing regulations set forth at Title 36, Code of Federal Regulations, part 1194. Supplier agrees to promptly respond to and resolve any complaint regarding accessibility of its products or services which is brought to its attention. Supplier further agrees to indemnify and hold harmless the Commonwealth of Virginia or any agency thereof using the supplier's products or services from any claim arising out of its failure to comply with the aforesaid requirements. Failure to comply with these requirements shall constitute a breach and be grounds for termination of this agreement." This language puts the burden and expense of Section 508 compliance on the supplier supplying IT goods and services to the Commonwealth.

10.4 Technology Access Clause

10.4.1 Overview

As required by the Information Technology Access Act ([§§ 2.2-3500 et seq.](#) of the *Code of Virginia*), all contracts for the procurement of information technology by, or for the use of, agencies all covered entities as defined by [§ 2.2-3501](#), shall include the technology access clause which requires compliance with the non-visual access standards established in [§ 2.2-3503\(B\)](#). "Covered entity" means all state agencies, public institutions of higher education, and political subdivisions of the Commonwealth.

10.4.2 Procurement requirements

The technology access clause specified in clause (iii) of [§ 2.2-3502](#) of the *Code of Virginia* shall be developed by the Secretary and shall require compliance with the nonvisual access standards established in subsection B of [§ 2.2-3503](#). The clause shall be included in all future contracts for the procurement of information technology by, or for the use of, entities covered by this chapter on or after the effective date of this chapter. At a minimum, the nonvisual access standards shall include the following: (i.) the effective, interactive control and use of the technology (including the operating system), applications programs, and format of the data presented, shall be readily achievable by nonvisual means; (ii.) the technology equipped for nonvisual access shall be compatible with information technology used by other individuals with whom the blind or visually impaired individual interacts; (iii.) nonvisual access technology shall be integrated into networks used to share communications among employees, program participants, and the public; and (iv.) the technology for nonvisual access shall have the capability of providing equivalent access by nonvisual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired. A covered entity may stipulate additional specifications in any procurement.

10.4.3 Exceptions to nonvisual access standards

Compliance with the nonvisual access standards shall not be required if the head of the procuring agency determines that (i) the information technology is not available with nonvisual access because the essential elements of the information technology are visual and (ii) nonvisual equivalence is not available. Visit these VITA websites: [IT Accessibility Standards](#), [Web Site Standards](#), [Web Site Guidelines](#) for more information.

10.4.4 EO 47- Expanding Opportunities for Virginians with Disabilities

Executive Order 47 reaffirms and expands upon the Commonwealth's commitment to the increased inclusion of, and expansion of opportunities for, individuals with disabilities.

This includes ensuring that the Commonwealth's websites are readily accessible to individuals with disabilities.

VITA supports the effort set forth in Executive Order 47, and continues to work with other state agencies to improve the accessibility of the Commonwealth's websites for Virginians with disabilities. VITA encourages Suppliers to support the advancement of opportunities for disabled Virginians by expanding and improving upon accessibility of the Commonwealth websites.

10.5 Commonwealth security requirements for IT solicitations and contracts

[Section 2.2-2009](#) of the *Code of Virginia* mandates that the Chief Information Officer (CIO) is responsible for the development of policies, standards, and guidelines for assessing security risks, determining the appropriate security measures and performing security audits of government electronic information. Such policies, standards, and guidelines shall apply to the Commonwealth's executive, legislative, and judicial branches and independent agencies. Further, it requires that any contract for information technology entered into by the Commonwealth's executive, legislative, and judicial branches and independent agencies require compliance with applicable federal laws and regulations pertaining to information security and privacy. While agencies are required to comply with all security policies, standards and guidelines (PSGs), Security Standard SEC525 provides agency compliance requirements for non-CESC hosted cloud solutions. These PSGs are located at this URL: <https://www.vita.virginia.gov/it-governance/itrm-policies-standards/>

Furthermore, [§ 2.2-2009](#) requires the CIO to (i) conduct an annual comprehensive review of cybersecurity policies of every executive branch agency, with a particular focus on breaches in information technology that occurred in the reviewable year and any steps taken by agencies to strengthen cybersecurity measures, and (ii) issue a report of his findings to the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance.

In addition to Security Standard SEC525, for any procurements for third-party (supplier- hosted) cloud services (i.e., Software as a Service), since agencies have \$0 delegated authority to procure these types of solutions, there is a distinct process for obtaining VITA approval to procure. At the link above, refer to the Third Party Use Policy. Your agency's Information Security Officer or AITR can assist you in understanding this process and in obtaining the required documentation to include in your solicitation or contract. There are specially required Cloud Services terms and conditions that must be included in your solicitation and contract, and a questionnaire that must be included in the solicitation for bidders to complete and submit with their proposals. You may also contact: enterpriseservices@vita.virginia.gov.

10.5.1 Discrimination prohibited

The *Code of Virginia* prohibits discrimination based on race, religion, color, sex, age, disability, or national origin in procurement transactions as well as discrimination against ex-offenders, small, women and minority-owned businesses and faith-based organizations. All businesses and citizens are to have equal access to the Commonwealth's procurement opportunities.

10.5.2 Small businesses owned by women, minorities, service disabled veterans and micro businesses

To the extent allowed by law, this public body does not discriminate against faith-based organizations in accordance with the *Code of Virginia*, [§ 2.2-4343.1](#) or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, sexual orientation, gender identity or expression, political affiliation, or status as a service disabled veteran or any other basis prohibited by state law relating to discrimination in employment.

10.5.3 Small Business Enhancement Program

[Section 2.2-4310](#) of the *Code of Virginia* provides that any enhancement or remedial measure authorized by the Governor for state public bodies may allow for small businesses certified by the Department of Small Business and Supplier Diversity or a subcategory of small businesses established as a part of the enhancement program

to have a price preference over noncertified businesses competing for the same contract award, provided that the certified small business or the business in such subcategory of small businesses does not exceed the low bid by more than five percent

10.5.4 Ex-offenders

In the solicitation or awarding of contracts, no agency shall discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless the state agency, department or institution has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

10.5.5 Faith-based organizations

[Section 2.2-4343.1](#) of the *Code of Virginia* provides that agencies may enter into contracts with faith-based organizations on the same basis as any other nongovernmental source without impairing the religious character of such organization, and without diminishing the religious freedom of the beneficiaries of assistance provided under this section. For the purposes of [§ 2.2-4343.1](#), "faith-based organization" means a religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193. To the extent allowed by law, agencies in procuring IT goods or services or in making disbursements pursuant to this section, shall not (i.) discriminate against a faith-based organization on the basis of the organization's religious character or (ii.) impose conditions that (a) restrict the religious character of the faith-based organization, except as provided in subsection F, or (b) impair, diminish, or discourage the exercise of religious freedom by the recipients of such goods, services, or disbursements.

All public bodies shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the public body does not discriminate against faith-based organizations.

10.6 Posting IT Solicitations and Awards

All IT solicitations, addenda and notices of award (including emergency and sole source awards) for IT goods and services over \$30,000 shall be posted on [eVA](#). When a solicitation is cancelled or amended, the notice of cancellation or amendment must be publicly posted on [eVA](#). Written solicitation notices up to \$30,000 are not required to be posted. Invitation for Bids (IFBs) notices over \$30,000 may be also published in a newspaper of general circulation for ten (10) days prior to the date for receipt of bids.

When an RFP is issued for an amount in excess of \$30,000, the solicitation shall be posted on [eVA](#) for at least 10 days and may also be published in a newspaper of general circulation in the area in which the contract is to be performed. If the RFP is cancelled or amended, a copy of the cancellation notice or addendum must be publicly posted on [eVA](#).

Award notices for all IT contracts in excess of \$30,000 must be posted for ten (10) days following the date of the award.

Emergency contract awards must state that the contract is being issued on an emergency basis. Sole source awards must state that only one source was determined to be practicably available. Both emergency and sole

source award postings should state what is being procured, the contractor selected, and the date on which the contract was or will be awarded. All award notices shall be posted on [eVA](#) for ten days following the date of the award. Subsequent/additional bid or proposal for same procurement

A supplier who submits a subsequent bid or proposal before the due date that is not specifically identified as an amendment to a previously submitted bid or proposal, shall be treated as having submitted a new bid/proposal in response to the original solicitation.

10.7 Subsequent/Additional Bid or Proposal for Same Procurement

A supplier who submits a subsequent bid or proposal before the due date that is not specifically identified as an amendment to a previously submitted bid or proposal, shall be treated as having submitted a new bid/proposal in response to the original solicitation.

10.8 Prohibited Participation

[Section 2.2-4373](#) of the *Code of Virginia* provides the following regarding participation in bid preparation and limitation on submitting bid for same procurement: “No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement that is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body.”

10.9 Contract and Purchase Order Modification Restrictions

A contract or purchase order may not be renewed, extended or otherwise modified unless provided for in the original contract. The contract price may not be increased nor additional consideration given because of a contract renewal or extension unless such increase is specifically authorized under the original contract. As provided in [§ 2.2-4309](#) of the *Code of Virginia*, no fixed price contract may be increased by more than 25% of the original amount of the contract or \$50,000, whichever is greater, without the advance written approval of the Governor or his designee. Additionally, if the contract renewal must undergo certain VITA approvals (Project Governance Request (PGR) or ECOS Assessment approvals, the agency must obtain those approvals prior to issuing a contract renewal. See this link for more guidance: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>. Refer to section 10.12 which discusses prohibited contracts. The same prohibitions will apply for any contract renewals.

10.10 Contract Pricing

As provided in [§ 2.2-4331](#) of the *Code of Virginia*, VITA may award IT contracts on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited by this section with the following exceptions: “Except in case of emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost. A policy or contract for insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier’s administrative costs and retention stated in whole or in part as a percentage of such claims, shall not be prohibited.”

10.11 Order Splitting Prohibition

Placing multiple orders to one or more suppliers for the same IT goods or services in order to avoid conducting a competitive procurement or to purchase such items to remain within an agency's delegated procurement authority limit is prohibited.

10.12 Prohibited contracts

The *Code of Virginia* prohibits the Commonwealth from entering into certain types of contracts and to contract with individuals or businesses who have defaulted on some obligation to the Commonwealth. These prohibitions are as follows:

[Section 2.2-4331](#) of the *Code of Virginia* provides that no contract shall be awarded by the Commonwealth on the basis of cost plus a percentage of cost except in the case of emergency affecting the public health, safety or welfare. Contracts may be awarded on a fixed price or cost reimbursement basis, or any other basis that is not prohibited.

[Section 2.2-4321](#), [§ 2.2-4321.1](#), and [§ 2.2-4311.2](#) of the *Code of Virginia* prohibit agencies from contracting with any supplier or affiliate of the supplier who:

- Fails or refuses to collect and remit sales tax
- Fails or refused to remit any tax due unless the supplier has entered into a payment agreement with the Department of Taxation to pay the tax and is not delinquent under the terms of the agreement or has appealed the assessment of the tax and the appeal is pending. The determination of whether a source is a prohibited source shall be made by the Department of Taxation after providing the prohibited source with notice and an opportunity to respond to the proposed determination. The Department of Taxation shall notify the Department of General Services of its determination.
- Is not authorized to transact business in the commonwealth.
- Is included on the Commonwealth of Virginia's Debarment List at the time of award.

Additionally, an agency may not award a contract to a supplier, including its affiliates and all subcontractors if they are excluded on the federal government's System for Award Management (SAM) at <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/#sam>; or, who is not registered in eVA at time of award.

[Section 2.2-5514](#) of the *Code of Virginia* prohibits agencies from using, whether directly or through work with or on behalf of another public body, any hardware, software, or services that have been prohibited by the U.S. Department of Homeland Security for use on federal systems.

Except for the [§ 2.2-5514](#) prohibitions specified above, agencies may contract with these sources in the event of an emergency or if contractor is the sole source of needed goods and services.

10.13 VITA Mandatory Contract Terms and Conditions for Public IT Contracts

A complete list of the VITA Mandatory Contract Terms and conditions is available on VITA's website at: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/mandatory-contract-terms/>. The terms and

conditions at this URL are subject to change according to legislative updates or change in VITA policy. Users are encouraged to review the URL(s) periodically to ensure compliance with the current version.

10.14 Employment Discrimination by Contractor Prohibited

As stated in [§ 2.2-4311](#) of the *Code of Virginia*, all public bodies shall include in every contract of more than \$10,000 the following provisions:

- “1. To the extent allowed by law, during the performance of this contract, the contractor agrees as follows:
 - a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, sexual orientation, gender identity or expression, national origin, age, disability, status as a service disabled veteran or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
 - b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.
 - c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.
2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.”

10.14.1 Drug-free workplace to be maintained by contractor

[Section 2.2-4312](#) specifies that “all public bodies shall include in every contract over \$10,000 the following provisions:

During the performance of this contract, the contractor agrees to (i.) provide a drug-free workplace for the contractor’s employees; (ii.) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor’s workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii.) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace; and (iv.) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, ‘drug-free workplace’ means a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract.”

10.14.2 Payment clauses

Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with [§ 2.2-4354](#), shall include:

- “A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the agency or local government for work performed by the subcontractor under that contract:
 - Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or
 - Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor’s payment with the reason for nonpayment.
- A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers.
- An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1.
- An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month."
- “Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor. A contractor’s obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section shall not be construed to be an obligation of the state agency or agency of local government. A contract modification shall not be made for the purpose of providing reimbursement for the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the interest charge.”

10.14.3 Insurance

Contractors are required to have current workers’ compensation, employer’s liability, commercial general liability and automobile liability insurance policies when work is to be performed on state owned or leased property or facilities. In certain types of IT service contracts and to mitigate certain risks, professional liability/errors and omissions insurance and/or cyber liability insurance coverage is also required. The Commonwealth of Virginia must be named as an additional insured when requiring a contractor to obtain commercial general liability coverage.

In some specific cases, workers’ compensation insurance and employer’s liability insurance may not be required. Workers’ compensation insurance is required when the contractor has three (3) or more employees. If work is performed by a sole proprietor, the person does not need workers’ compensation insurance, as they do not have employees.

Employer's Liability Insurance is required if an employer has employees who are paid a wage or salary. Employer's liability insurance is not required for persons in business together, e.g., husband and wife, siblings or parents and children, as these persons would be considered owners not employees.

All agreed upon and statutorily mandated insurance must be obtained by the supplier prior to commencing work and must be maintained during the entire term of the contract.

Documentation confirming the contractor's insurance shall be included in the procurement file.

In IT services and solutions contracts, Errors and Omissions Insurance should always be required by Suppliers, except for simple computer-off-the-shelf (COTS) software products. This insurance covers a Supplier's performance errors and intentional or accidental omissions in their performance obligated by the contract's technical/functional requirements. The coverage amount is based on the complexity of your procurement. For instance, if a Supplier is developing a custom solution for the agency, or if the procurement is providing a critical business continuity service to citizens, or if the Supplier is providing a cloud service (i.e., Software as a Service), then a higher amount of coverage should be required. Typical language to include in a contract is: "Supplier shall carry errors and omissions insurance coverage in the amount of \$2,000,000 per occurrence."

For cloud service procurements, it is recommended to require Supplier to also provide coverage for Cyber Security Liability Insurance to assist in data loss or security breach, which can result in losses valued in excess of millions of dollars. This is a relatively new type of insurance that some Suppliers will not have. Often they will say it is included in their Errors and Omissions insurance. If that is the case, you should require a higher coverage in the Errors and Omissions requirement and ask them to confirm how their insurance provider will cover incidents of data loss and security breach. Get the facts in writing and include applicable language in your contract. The typical language to include in your contract requirement for this is: "Supplier shall carry Cyber Security Liability insurance coverage in the amount of \$5,000,000 per occurrence. The coverage amount can be increased based on your risk factor and project complexity and data/security sensitivity. The minimum coverage amount required by VITA Security remains at \$5,000,000. Any reduction must be approved by VITA Security and/or the CIO."

10.15 Computer Equipment Performance Specifications

[Section 2.2-2012\(E\)](#) of the *Code of Virginia* provides that if VITA, or any executive branch agency authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in [§ 2.2-4301](#), it may purchase such goods from any supplier following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, and that it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts shall emphasize performance criteria including price, quality, and delivery without regard to "brand name." All vendors meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts.

10.16 Taxes

10.16.1 Excise tax

The Commonwealth of Virginia is generally exempt from paying federal excise taxes.

10.16.2 State sales tax

The Commonwealth of Virginia is generally exempt from paying Virginia's sales taxes on purchases of tangible personal property for its use or consumption. Agencies may receive requests for a tax exemption certificate or exemption number. When taxes are improperly included on the face of a bid, the bidder will be given the opportunity to delete them.

Requests for exemptions from state sales taxes should be routed to: scminfo@vita.virginia.gov.

10.16.3 Sales and use tax for state government and political subdivisions

Virginia's sales and use tax does not apply to sales of tangible personal property to the Commonwealth of Virginia or to its political subdivisions, for their use or consumption, if the purchases are pursuant to required official purchase orders to be paid for out of public funds. The tax applies when such sales are made without the required purchase orders and are not paid for out of public funds. No exemption is provided for state or local government employee purchases of meals or lodging whether purchases are pursuant to required official purchase orders or not.

10.16.4 Sales and use tax for contractors

Persons who contract with the Commonwealth or its political subdivisions to perform an IT service and in providing the service also provide some tangible personal property are the consumers of such property and are not entitled to a sales or use tax exemption. This is true even though title to the property provided may pass to the Commonwealth and/or the supplier may be fully and directly reimbursed by the government.

10.17 Commodity Codes

The list of commodity codes for IT products and services is posted on the VITA web site at the following link: https://www.vita.virginia.gov/media/vitavirginiagov/supply_chain/pdf/NIGP-code-updates-eff-July-2017.pdf.

10.18 Freight

Freight and delivery charges shall be included in the pricing schedule, if needed, in all bids and proposals. When necessary, freight and delivery charges are used in the evaluation and award and should be clearly reflected on all documentation in the procurement file.

By signing an IFB, suppliers certify that the bid prices offered for F.O.B destination include only the actual freight rate costs at the lowest available rate and such charges are based upon the actual weight of the goods to be shipped.

F.O.B. destination. – F.O.B. destination literally means “free on board.” It is the place at which ownership (title) of the goods passes to the buyer and usually, but not always, the point at which the buyer is responsible for the shipping costs. F.O.B. destination means that all freight charges are paid by the supplier who owns and assumes all risk for the goods until they are accepted by the Commonwealth at the designated delivery point. Unless there is a specific finding that F.O.B. destination is not appropriate for a particular IT procurement, F.O.B. destination is the Commonwealth’s preferred method of freight. The cost of shipping the goods may be included in the quoted price or by the bidder or offeror as a separate line item.

F.O.B. origin – Under F.O.B. origin, the supplier is required to select the most economical method of shipment consistent with the required delivery date. The supplier will prepay the freight charge and add it to the invoice.

Regardless of the F.O.B. point, the Commonwealth accepts title only when goods are received. Under F.O.B. origin, the total cost for freight to destination, shipping and handling charges shall be included in determining the lowest responsive and responsible bidder. The cost of the freight, shipping and/or handling should be reflected as a line item on the purchase order.

In the table below, the first entry (F.O.B. destination) is the most beneficial to the Commonwealth, while the others increase the expense and risk to the state. Remember that when ownership passes to the agency at the point of origin, the agency owns the merchandise in transit. The agency would then be obligated to pay for lost or damaged shipments. There may be times when accepting a lower bid requires an agency to pay the shipping costs and accept the risk of loss for merchandise in transit. The following table summarizes commonly used shipping terms and their implications. When you see the term "Freight Allowed", it means the seller pays the freight bill and absorbs the costs.

| Terms of sale | Payment of initial freight charge | Bears final freight cost | Owens goods in transit | File claims, if any |
|---|-----------------------------------|--------------------------|------------------------|---------------------|
| F.O.B. destination, freight prepaid | Seller | Seller | Seller | Seller |
| F.O.B. destination, freight collect | | Buyer | Seller | Seller |
| F.O.B. destination, freight prepaid and added (charged back to buyer on invoice) | Seller | Buyer | Seller | Seller |
| F.O.B. shipping point, freight prepaid | Seller | Seller | Buyer | Buyer |
| F.O.B. shipping point, freight collect | | Buyer | Buyer | Buyer |
| F.O.B. shipping point, freight prepaid and added (charged back to buyer on invoice) | Seller | Buyer | Buyer | Buyer |

10.19 Used Equipment

Used equipment can be a viable source of technology provided it is certified acceptable for manufacturer's maintenance. All such costs for certification must be borne by the seller and must be included in the bid or

proposal pricing. The same VITA review and approval that applies to new IT equipment (refer to [Chapter 1](#) of this manual) also applies to used IT equipment.

10.20 Evaluation Products and Testing

Evaluation products may be requested to verify quality levels or to test equipment to determine conformance with the specifications stipulated in a solicitation and/or to determine ability to interface with existing equipment. Evaluation products may only be requested when conducting a formal solicitation. A request for an evaluation product must be clearly indicated in the solicitation. Return of evaluation products submitted will be at supplier's risk and expense. Evaluation products required in a bid or proposal must be submitted prior to the solicitation due date. Failure to submit requested evaluation products may result in rejection of bid or proposal. Evaluation products should be properly labeled, stored and controlled by the receiving public body until no longer needed. All evaluation products submitted are subject to testing. Those not destroyed during testing may be returned at the bidder's or offeror's expense. Evaluation products of the successful supplier may be held for comparison with deliveries.

If, after 30 days, the evaluation products have not been picked up and suppliers fail to provide disposition instructions, evaluation products may be offered to other agencies or internal operating departments for use. Evaluation products not picked up by bidder within 30 days of award will become the property of the Commonwealth. If the items have significant reusable utility value, they should be disposed of using established property disposal procedures. The procurement file must be documented as to disposition of all evaluation products.

10.21 Guarantees and Warranties

The following guidelines should be taken into account when deciding the appropriate warranty or guarantee terms and conditions to include in IT solicitations and the final negotiated contract:

- Determine if procuring agency wants to specify the length of time the warranty is to run;
- Determine if warranty is needed to prevent damage to existing resource information from computer viruses or shut down devices;
- Select the guarantee or warranty special term and condition that best suits the needs of the agency for the particular solicitation; and
- When considering a non-industry standard warranty, the agency should obtain the appropriate cost associated with the desired warranty; a written justification for the desired warranty and any additional cost to be included in the procurement file.

Many IT suppliers will agree to provide greater than 90-day warranty periods during negotiation, or even a 12-month for solution/development type contracts. Computer-off-the-shelf manufacturers generally offer 30 or 60-day warranty periods. Larger IT companies often provide 90-day warranty periods. Agencies should not have to reimburse a supplier for errors corrected or fixes made during a warranty period. The warranty period should start after final acceptance by the agency, while any procured annual maintenance or support would begin once the warranty period is over. For a more in-depth discussion of warranties refer to [Chapter 25](#) of this manual, IT Contract Formation:

10.22 Procurements Which Require FCC Licensing

All facilities, equipment and services that require Federal Communications Commission (FCC) licensing (e.g., uplinks, television and radio broadcast frequencies, microwave, two- way radio), etc., are the responsibility of VITA to coordinate and acquire. All agencies, whether in scope or not, must submit all supporting documentation to the agency or institution's assigned agency telecomm coordinator (ATC) or submit a request through VCCC prior to any acquisition of telecommunications equipment or service. There is no dollar amount associated with this requirement. Any device requiring FCC authorization or licensing must be approved by VITA. If the equipment or services are on a current VITA state contract, VITA will approve the procurement and return the request with the appropriate written approval. If the equipment or services are not currently available through an existing contract process, VITA will acquire the requested goods or services on behalf of the requesting agency or institution.

10.23 Unsolicited Proposals

VITA encourages its suppliers to submit new and innovative technology ideas by submitting unsolicited proposals. The submission of these proposals allows for VITA to consider unique and innovative ideas or approaches that have been developed in the private sector and to bring those innovations into state government. Any supplier who is considering submitting an unsolicited proposal to VITA for IT should adhere to the following rules:

- The IT idea or concept being proposed must be innovative and unique.
- The technology concept or idea must be independently originated and developed by the offeror submitting the unsolicited proposal.
- All unsolicited proposals must be prepared without Commonwealth assistance, endorsement, direction or involvement.
- The unsolicited proposal must include sufficient detail to permit a determination if it would be worthwhile for the Commonwealth to study and/or consider.
- The unsolicited proposal cannot be an advance proposal for a known agency or Commonwealth requirement that can be acquired through competitive methods. The proposal should not address a previously published agency requirement or need.
- All solicited and unsolicited proposals and all solicited and unsolicited ideas for innovation or improvement are submitted at the risk of and expense of the offeror, and create no financial or legal obligation on the part of the Commonwealth.
- Any ideas or information contained in an unsolicited proposal may be used freely by the Commonwealth and no restriction on the Commonwealth's use of such ideas, proposals or the information contained therein shall arise in connection with such submission.
- A favorable comprehensive evaluation of an unsolicited proposal by VITA does not, in itself, justify awarding a contract without providing for competition. No preference shall be given to any offeror that initially offers the unsolicited proposal. If it is determined by the evaluation that goods or services required by the agency and offered in an unsolicited written proposal are practicably available from only one source, a buyer may negotiate and award a contract following the VITA's sole source procedures. The buyer shall post a notice of award for ten (10) calendar days.

All unsolicited proposals for IT and are submitted to VITA with the following proviso(s):

- All unsolicited proposals are submitted at the risk of and expense of the offeror and with no obligation on the part of the VITA or the Commonwealth.
- Unsolicited proposals must contain no restrictions on the Commonwealth's or VITA's use of any ideas, proposals or the information contained in such proposals.
- VITA may charge a fee for review of an unsolicited proposal.
- A minimum fee of \$1,000 (or greater) may be charged for review of unsolicited proposals under a specified amount (\$50,000) and an increased fee schedule over that amount. Proposals requiring technical review would be billed on an hourly basis as appropriate for time spent in review.
- All unsolicited proposals will be evaluated for their participation and encouragement of small businesses including women and minority-owned businesses and businesses owned by service-disabled veterans.

Unsolicited proposals shall be submitted in writing directly to VITA's Supply Chain Management Division at scminfo@vita.virginia.gov. Favorable evaluation by VITA or the Commonwealth of an unsolicited proposal does not in itself justify procurement or awarding a contract without VITA first putting out the proposal for competition and providing for competitive negotiation or competitive sealed bidding, as required.

10.24 Use of Brand Names

Use of a brand name or equal specification should only be used to indicate a desired quality level and should be based upon one or more supplier's commodity description(s), model number(s) and quality level. The supplier's commodity numbers should be easily identifiable in a current publication that is available to most suppliers. Commodity descriptions must be sufficiently detailed and specify only the required features needed. As provided in [§ 2.2-4315](#) of the *Code of Virginia*, "Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named and shall be deemed to convey the general style, type, character, and quality of the article desired. Any article that the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted."

10.25 Supplier Advertising Prohibition

Without the express written consent of VITA, IT suppliers are prohibited from advertising or utilizing sales material which states that a Commonwealth agency has purchased a supplier's IT product or service.

10.26 Public-Private Education Facilities and Infrastructure Act (PPEA) Procedures for State Agencies and Institutions

The Public-Private Education Facilities and Infrastructure Act of 2002 – [§§ 56-575.1 et seq.](#) of the *Code of Virginia* (the "PPEA") – allows VITA to create public-private partnerships for the development of a wide range of projects for public use if VITA determines the project serves a public purpose and that private involvement may provide the project in a timely or cost-effective fashion. The [PPEA](#) allows VITA to develop innovative public-private partnerships with its suppliers through solicited and unsolicited proposals for projects for which VITA determines there is a public need. The PPEA serves as an alternative procurement method for IT in certain circumstances.

The PPEA is designed to bring private funding and/or private risk to public projects in the Commonwealth. The PPEA is intended to provide a faster mechanism for the funding and completion of projects that are time sensitive. Like the Public Private Transportation Act, the PPEA allows for creative financing and allows private entities to bring innovative thinking and vision to public projects.

The PPEA authorizes responsible public entities to use the PPEA procurement process. These entities include state agencies, public educational institutions, counties, cities and town and public authorities.

In order for a project to be eligible under the PPEA, it must meet the definition of a qualifying project. For IT, the PPEA establishes the following as qualifying projects: "... (vi) technology infrastructure, services and applications, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; (vii) any services designed to increase productivity or efficiency through the direct or indirect use of technology, (viii) any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas. . ." ([§ 56-575.1](#) of the *Code of Virginia*) The PPEA establishes requirements for the review and approval of proposals received pursuant to the PPEA. In addition, the PPEA specifies the criteria that must be used to select a proposal and the contents of any comprehensive agreement between VITA and the private entity.

[Section 56-575.16.2](#) of the *Code of Virginia*, provides, in part: " 2. A responsible public entity may enter into a comprehensive agreement in accordance with guidelines adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as set forth in [§ 2.2-4302.2](#) and subsection B of [§ 2.2- 4310](#). Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received. Other factors that may be considered include (i) the proposed cost of the qualifying facility; (ii) the general reputation, industry experience, and financial capacity of the private entity; (iii) the proposed design of the qualifying project; (iv) the eligibility of the facility for accelerated selection, review, and documentation timelines under the responsible public entity's guidelines; (v) local citizen and government comments; (vi) benefits to the public; (vii) the private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and residents; and (ix) other criteria that the responsible public entity deems appropriate.

10.26.1 PPEA process

The PPEA process can be initiated in two ways. An agency may issue a solicitation for PPEA proposals, like a traditional RFP, or an agency may receive an unsolicited proposal (see subsection 10.23 above) where a private entity submits a proposal not in response to a solicitation or notice. When an agency is considering issuing a notice for solicited proposals, it must first make a determination that it reasonably expects the PPEA process to be more beneficial than traditional procurement processes under the VPPA. A public notice soliciting PPEA

proposals must allow for at least forty-five (45) days for proposals to be submitted. Notice must be posted on [eVA](#).

If an agency receives an unsolicited PPEA proposal, it must make a threshold decision as to whether the proposal fits with the agency's business objectives and should be pursued. If the agency decides to accept the unsolicited PPEA proposal, it must post a public notice for at least forty-five (45) days which details the subject matter of the proposal and requests that competing proposals be submitted. Notice must be posted on [eVA](#). If the agency decides not to accept the unsolicited PPEA proposal, the agency should return the proposal to the private entity.

The PPEA may be a useful tool to achieve certain objectives but it is just another procurement method. Most PPEA proposals involve costly, high profile projects so it is imperative that agencies closely follow the PPEA procurement procedures to ensure a fair competitive process. See Commonwealth of Virginia PPEA Guidelines and Procedures. <https://dgs.virginia.gov/globalassets/business-units/deb/documents/ppea-adminstration-guidelines-2008.pdf>.

10.26.2 Fees for proposal review

Under [§ 56-575.4](#), agencies may charge a reasonable fee to cover the costs of processing, reviewing and evaluating proposals and charge for reasonable attorney's fees and fees for financial, technical, and other necessary advisors or consultants. Such sums shall be paid with certified funds and shall be deposited in the State Treasury on the books of the Comptroller in a special statewide fund known as the PPEA Fund.

If the cost of reviewing the proposal is less than the established proposal fee, the Agency may refund the excess to the proposer. If during the initial review the Agency decides not to proceed to conceptual-stage review of an unsolicited proposal, the proposal fee, less any direct costs of the initial review, shall be refunded to the private entity.

If the Agency chooses to proceed with evaluation of proposal(s) under the PPEA, it shall not do so until the entire, non-refundable proposal fee has been paid to the Commonwealth in full.

10.26.3 Proposal format for submission of proposals

Proposal format for conceptual proposals. Proposals shall provide a straightforward, concise delineation of capabilities, experience and approach. Elaborate brochures and/or excessive promotional materials are not required or desirable. Firms that submit proposals may be required to make an oral presentation of their proposal with participation by key personnel. All information requested in the Section VI (A) "FORMAT FOR SUBMISSION OF CONCEPTUAL PROPOSALS" must be included in any proposal submitted to VITA. In addition, all submitted proposal should also contain the following in addition to the requirements of the Model Procedures:

- Project Characteristics:
 - Proposal should include sufficient data, analysis and information sufficient to satisfy VITA that the project would serve a public purpose as required by the PPEA.
 - Provide information about how the project is aligned with Virginia's strategic goals for technology.

- Financing:
 - Proposal must include sufficient financial information, which evidences the proposer's financial stability and an ability to provide financing to support the project.
 - The financial plan for the proposed project must contain enough detail, including cost benefit and tax analysis studies, so that an analysis will reveal whether the proposed financing is feasible.
- References:
 - Each proposal should provide reference information for three to five successful relevant projects completed by the proposer.
 - References should include the following information:
 - Project owner/sponsor (business name and address)
 - Owner's project manager (name, telephone and fax numbers)
 - Project summary, budget and final cost
 - Project schedule (proposed and actual)
- Lawsuits or arbitration proceedings:
 - Each proposal should include a list and explanation of all lawsuits and arbitration proceedings during the past three years involving any of the proposing firms or any of its principles.

Proposal format for detailed proposals. A detailed proposal should not depart significantly from the technical approach or financing plan described in the conceptual proposal. If a proposer departs significantly in either respect, VITA may reject the detailed proposal as non-compliant. In particular, adoption of significant aspects or characteristics of a competing conceptual proposal will normally result in disqualification and rejection of a detailed proposal. At any time during the detailed stage, VITA may ask a proposer to provide additional information, data, analysis or any other information needed to sufficiently review the project. If necessary to protect additional confidential proprietary information, which may be included in the detailed proposal, VITA and the proposer will modify the previously executed agreement on protection of confidential information as needed.

Requirements for both conceptual and detailed proposals. All PPEA proposals (conceptual phase and detailed phase) should follow the following format:

- All submitted proposals shall be clearly marked as a "PPEA Proposal."
- To be considered, one original and five (5) copies and one electronic copy of any unsolicited or solicited proposals must be submitted.
- The applicable fee must be paid to VITA for all unsolicited proposals.
- The cover page must include the title of the proposal, the name and address of the proposing entity, the individual authorized to act on behalf of the proposer and his or her telephone and facsimile numbers and email address.
- An authorized representative of the firm or consortium making the proposal must sign the proposal.
- Each proposal should include an executive summary, which includes a summary of organizational structure, size of the firm(s), brief history, and areas of expertise which qualify the firm for the work and full range of services required for the proposed project.
- All pages of the proposal should be consecutively numbered.
- The proposal should contain a table of contents which cross references the requirements by category.

- Each copy of the proposal should be bound or otherwise contained in a single volume where practicable.
- All proposal documentation for which a claim of confidentiality is made should be submitted in a separately bound clearly marked volume for convenience of review by VITA and to reduce the potential for inadvertent disclosure.
- All PPEA proposals should be submitted via mail or hand delivery to:

Chief Information Officer C/O VITA, PPEA Proposals 11751 Meadowville Lane
Chester, VA 23836

10.26.4 PPEA proposals and the Freedom of Information Act

Upon the receipt of a written request for protection of documents, the responsible public entity shall determine whether the documents contain (i) trade secrets, (ii) financial records, or (iii) other information that would adversely affect the financial interest or bargaining position of the responsible public entity or private entity in accordance with Section D.1. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. If the written determination provides less protection than requested by the private entity, the private entity should be accorded an opportunity to withdraw its proposal. Nothing shall prohibit further negotiations of the documents to be accorded protection from release although what may be protected must be limited to the categories of records identified in Section D.1. Once a written determination has been made by the responsible public entity, the documents afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of the responsible public entity or any affected local jurisdiction, or the Public Private Partnership Advisory Commission as provided for in [§ 30-281](#) of the *Code of Virginia*, to which such documents are provided. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible public entity shall not be open to public inspection.

Protection from mandatory disclosure for certain documents produced by the responsible public entity.

Memoranda, staff evaluations, or other records prepared by or for the responsible public entity, its staff, outside advisors or consultants, exclusively for the evaluation and negotiation of proposals may be withheld from disclosure if the disclosure of such records required by the PPEA would adversely affect the financial interest or bargaining position of the responsible public entity or private entity, and the basis for the determination of adverse effect is documented in writing by the responsible public entity.

Cost estimates relating to a proposed procurement transaction prepared by or for a responsible public entity shall not be open to public inspection.

If a private entity fails to designate confidential or proprietary information, records or documents for protection from disclosure, such information, records or documents shall be subject to disclosure under FOIA. A responsible public entity (RPE) may not withhold from public access:

- (a) procurement records other than those subject to the written determination of the responsible public entity;
- (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind executed by the responsible public entity and the private entity;

- (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or
- (d) information concerning the performance of any private entity developing or operating a qualifying project.

However, to the extent that access to any procurement record or other document or information is compelled or protected by a court order, then the RPE must comply with such order.

10.26.5 Agreement on protection of confidential information

If VITA should decide to accept a proposal for consideration at the conceptual phase, VITA and the proposer will execute a written confidentiality agreement designating specifically what confidential proprietary information within the proposal will be excluded from public disclosure.

10.26.6 VITA's reservation of rights

In connection with any proposal or qualifying project, VITA shall have all rights available to it by law in administering the PPEA proposals that it receives, including without limitation the following:

- Right to reject any or all proposals at any time, for any reason, solely within the discretion of VITA. Proposers shall have no recourse against VITA for such rejection. Proposers will be notified in writing of such rejection.
- Terminate evaluation, review or consideration of any and all proposals at any time and reserve the right to issue an RFI or RFP for the proposed project.
- Suspend, discontinue and/or terminate comprehensive agreement negotiations with any proposer at any time before the actual authorized execution of a comprehensive agreement by all parties.
- Negotiate with a proposer without being bound by any provision in its proposal.
- Decline to return any fee required to be paid by proposers hereunder, except for initial fees paid by proposers with an unsolicited conceptual proposal where VITA declines to accept the proposal for consideration.
- Request revisions to conceptual or detailed proposals at any time during the conceptual or detailed review stages.
- Submit a proposal for review by outside consultants or advisors selected by VITA without notice to the proposer. Such consultants or advisors shall be contractually required to be bound by the agreement on protection of confidential information between the proposer and VITA.

VITA recognizes that it may receive proposals, which have certain characteristics in common yet differ in meaningful ways. In such cases, VITA reserves the right, in its sole discretion, to treat such a proposal or any portion of such proposal received after the original proposal, as either a competing proposal or a noncompeting unsolicited proposal, and to proceed accordingly.

10.26.7 Additional VITA provisions

Under no circumstances shall VITA be liable for, or reimburse any cost incurred by a proposer, whether or not selected for negotiations, in developing a proposal, submitting additional requested information to VITA or in negotiating a comprehensive agreement.

Any and all information VITA makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind. Proposers may not rely upon any oral responses to inquiries. If a proposer has a question or needs clarification on any matter during the PPEA process, the proposer must submit the question in writing and VITA will respond in writing as it deems appropriate.

10.26.8 When is a similar proposal a competing proposal?

In the event a potential proposer is unsure whether its planned proposal will be sufficiently similar to the proposal which was the subject of a notice to be deemed a competing proposal, such proposer may submit to VITA a written request for a preliminary determination of whether its project would be deemed a competing proposal in whole or in part. VITA will respond to such request with a preliminary determination as to whether or not the proposal would be a competing proposal or that it has received insufficient information to make a determination. In the event VITA elects to treat a proposal, or part of a proposal, received within the posting period as a noncompeting proposal, VITA will follow the forty-five (45) day posting period (or longer depending on the scope and complexity of the proposed project) to permit competing proposals to be submitted, including from the proposer whose proposal triggered the original notice.

10.26.9 PPEA proposal steps

For unsolicited PPEA proposals, please refer to procedures at: <https://dgs.virginia.gov/globalassets/business-units/deb/documents/ppea-adminstration-guidelines-2008.pdf>.

10.26.10 Applicability of other laws

Virginia's constitutional and federal and state statutory requirements governing appropriation and expenditure of public funds apply to any comprehensive agreement entered into between VITA and any proposer under the PPEA. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds by VITA shall be incorporated into any PPEA proposal.

Although the VPPA ([§§ 2.2-4300 et seq.](#) of the *Code of Virginia*) does not apply to qualifying projects submitted pursuant to the PPEA, the requirements of state and federal appropriations acts do apply wherever appropriated funds will be involved in the financing of a qualifying project. Proposals incorporating the use of state and/or federal funds should address how those proposals are consistent with the legal restrictions imposed in appropriations acts.

In soliciting or entertaining proposals under the PPEA, agencies shall comply with all applicable federal, state and local laws not in conflict with the PPEA. Likewise, in submitting proposals and in developing, executing or operating facilities under the PPEA, Private entities shall comply with all applicable federal state and local laws. Such laws may include, but not necessarily be limited to, contractual obligations which require Workers Compensation insurance coverage, performance bonds or payment bonds from approved sureties, compliance with the Virginia Prompt Payment Act, compliance with the Ethics in Public Contracting Act and compliance with environmental laws, workplace safety laws, and state or local laws governing contractor or trade licensing, building codes and building permit requirements.

Departments, agencies and institutions of the Commonwealth of Virginia are constitutionally prohibited from expending funds that are not appropriated by the Virginia General Assembly. Therefore, expenditure of state funds in support of an interim or comprehensive agreement requires and must be conditioned upon such appropriation of funds.

Proposals should avoid the creation of state-supported debt; however, should a proposal include such debt, procedures to secure specific approval by the Governor, General Assembly, the Department of Planning and Budget, the Department of the Treasury, and any other appropriate entities must be included in the proposal. In addition, a clear and detailed alternative if such approval is not achieved must be provided.

Any Agency considering construction of facilities through solicited or unsolicited proposals shall be responsible for ensuring compliance with the provisions of [§ 10.1-1188](#) of the *Code of Virginia* as it regards environmental issues and the need for an Environmental Impact Report.

In accordance with existing state law, or pursuant to directive from the Governor's Office, other Agencies may also have a right and/or responsibility with respect to the project and the Contractor's compliance with the terms of the comprehensive agreement.

While procedures incorporated in these guidelines are consistent with those of [§§ 2.2-4301](#) *et seq.* of the *Code of Virginia*. Under [§ 56-575.1](#), the VPPA shall not apply to actions under the Public-Private Education Facilities and Infrastructure Act.